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Issue Date: 11 February 2005

In the Matter of:

WILLIAM TAPPA,
Claimant

Case No. 2003-LHC-2085
OWCP No.: 10-39455

v.

MARINETTE MARINE CORP.,
Employer

and

SIGNAL MUTUAL INDEMNITY
ASSN. LTD,
Carrier

Appearances:

Michael B. Kulkoski
Michael B. Kulkoski, LLC
Green Bay, Wisconsin
For the Claimant

Gregory Sujack, Esq.
Garafolo, Schreiber, Hart & Storm
Chicago, Illinois
For the Employer

Karen Mansfield, Esq.
Office of the Solicitor
Chicago, Illinois
For the Director, OWCP

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702,

brought by the Claimant, William G. Tappa, against his employer, Marinette Marine Corporation, and its insurance carrier, Signal Mutual Indemnity Association, Ltd. The Act provides for payment of medical expenses and compensation for disability or death of maritime employees other than seamen injured on navigable waters of the United States or adjoining areas. In this case, Mr. Tappa alleges that he suffers from a permanent total disability arising from a back injury he suffered during his employment at Marinette Marine.

I conducted a hearing on this claim on November 18, 2003, in Green Bay, Wisconsin. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Claimant's Exhibits ("CX") 1-6, Employer/Carrier's Exhibits ("EX") 1-8, and Director's Exhibit ("DX") A were admitted into evidence without objection. Transcript ("Tr.") at 9-11. The record was held open after the hearing to allow the parties to submit additional evidence and argument. As the Employer/Carrier sought Special Fund relief, the Director of the Office of Workers' Compensation Programs ("Director," "OWCP") was also given leave to file a post-hearing brief. I hereby admit a one-page report from Dr. Sellers, which was submitted timely by the Employer/Carrier under cover of letter dated January 12, 2004, as EX 9 (EX 11 to the Amended Application for Section 8(f) Relief). All parties submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing, and the arguments of the parties.

STATEMENT OF THE CASE

William Tappa sustained a work-related low back injury on October 15, 2001, when he lifted a 100-150 lb. valve. After conservative treatment failed, he underwent surgery. His employer, Marinette Marine, voluntarily paid temporary total compensation and medical benefits until October 11, 2002. On October 12, 2002, the Employer/Carrier reduced his compensation from total to partial disability.

The parties agree that Mr. Tappa has reached maximum medical improvement, and that he will never be able to return to employment at Marinette Marine. The Claimant contends that he is permanently and totally disabled, and seeks continuing compensation for permanent total disability and medical benefits. The Employer/Carrier contends that there is suitable alternate work for Mr. Tappa, and that he is entitled to compensation only for permanent partial disability. The Employer/Carrier does not contest its liability for medical benefits.

The Employer/Carrier also maintains that Mr. Tappa injured his back on several earlier occasions, and that the injury from the accident in October 2001, combined with a pre-existing partial disability, resulted in greater disability than would have occurred from the last work-related injury alone. On this basis, it seeks relief from the Special Fund for any compensation due after 104 weeks of permanent partial or permanent total disability benefits pursuant to Section 8(f) of the Act. The Director, OWCP, opposes the award of 8(f) relief.

ISSUES

The issues before me are:

1. Whether Mr. Tappa's permanent disability is partial or total, i.e., whether there exists suitable alternative employment for him.
2. Whether the Employer/Carrier is entitled to Special Fund Relief.

Tr. at 6, 8; parties' closing briefs. During a prehearing telephone conference, and at the hearing, the parties also raised a potential issue regarding authorization of a medical procedure which had been recommended by one of Mr. Tappa's doctors. Because he had failed to attend a medical examination scheduled by the Employer/Carrier, authorization had been refused.¹ After the hearing, the Claimant attended the examination, and the examining physician agreed with the recommendation for the procedure, which was then authorized by the Employer/Carrier. *See* the letter from counsel for the Employer/Carrier dated January 12, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties were able to reach the following stipulations:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. Tr. at 8.
2. On October 15, 2001, the Claimant sustained an injury that arose out of and in the course of his employment. Tr. at 8.
3. A timely notice of the injury was given by the Claimant to the Employer/Carrier. Tr. at 8.
4. The Claimant filed a timely claim. Tr. at 8.
5. The average weekly wage at the time of injury was \$431.59. Tr. at 7.

¹ Initially, the Employer/Carrier sought a continuance of the hearing, and permission to suspend compensation payments to the Claimant, because of his failure to attend the examination. I denied the motion during a telephone conference held on November 13, 2001, and the parties agreed to reschedule the examination. *See* the transcript of the telephone conference; *see also* Tr. at 5-6. The Claimant testified at the hearing that he missed the appointment because he had no one to drive him. Tr. at 46-47, 63-64.

Summary of the Evidence

Mr. Tappa was born in 1951, and was 52 years old at the time of hearing. He lives alone in Marinette, Wisconsin. He was divorced in 1982 and has three children from that marriage. None of his children live in the Marinette area; however, the remainder of his family, except for one brother, all live in the Marinette-Peshtigo region. Tr. at 13-14.

He graduated from high school in 1969, and attended three years of technical school, from which he earned a state certificate in stick welding. Tr. at 14-16. Sometime in the early 1970's, he was convicted of burglary and served 18 months or more in prison. His first substantial employment consisted of working as a welder with his father for a short period of time. He then worked in Green Bay, Wisconsin, he could not recall exactly where, for approximately one year. Next, he was employed by Bay Ship in Sturgeon Bay where he worked in shipbuilding, doing structural welding. Tr. at 16-17. He was ultimately laid off from his job at Bay Ship and then took a job in Oshkosh. However, in the early 1980s, Bay Ship rehired Mr. Tappa and he resumed working there. Tr. at 19.

In 1980, he was in a fight in which he was hit over the head with a pool cue, and was examined for a head injury, but there was no fracture. EX 1. Also in the early 1980's, he was in an alcohol-related one-car accident. He ran off the road and was thrown from the car. He suffered a compression fracture in his lower back at his L3 vertebrae. Tr. at 18; *see also* medical records described below, *passim*, mentioning the incident as part of his medical history. He recovered fully and returned to work. Tr. at 19. In addition, during the same period, he suffered a gunshot wound to the chest in a hunting accident, and fractured his jaw in a fight. These incidents are also recounted in his medical records as part of his medical history. Mr. Tappa admitted that he had gotten into bar fights, but said that this took place when he was younger and involved "fist fights but nothing with a gun or anybody getting shot or stabbed, none of that." Tr. at 20-21. On cross examination, Mr. Tappa recalled another bar fight, but did not recall telling any doctor about it. Tr. at 57; EX 3:91. However, he did recall a man starting a fire at his house as a result of the bar fight. Tr. at 57-58. He also recalled the man shooting him in the face with a shotgun. Tr. at 58.

In 1984, while in a prison camp where he was incarcerated for two years (for being a convicted felon in possession of a weapon), Tr. at 22, he fell down 20-30 feet of steps, suffering a lumbosacral sprain and a new compression fracture at L3. Tr. at 22-23. Emergency room and hospital records from this injury are in the record at EX 2. Mr. Tappa continued to have problems with his back after this incident, resulting in additional treatment for which records are found at EX 3. The medical records disclose spinal stenosis and degenerative problems with his lower back, in addition to the injuries from accidents and falls. He underwent decompression surgery at L4-5 in June 1986. Mr. Tappa testified that it took him about nine months to recover from the surgery to the point where he felt he was at a plateau. Although he had experienced "fairly severe back pain" before the surgery, he felt "back to normal" after the nine-month period of time post-surgery. He could not recall whether his doctor gave him any instructions as to what kind of employment he could do or how much he could lift. Tr. at 23-25; CX 2.

In April 1989, he slipped and fell on some ice while at a store, and then later the same day, fell again when he was walking downstairs, and again a few days later when he bent over to tie his shoes. Medical records from each of these incidents, found in CX 2 and EX 3, described in detail below, describe significant back pain treated with medication and bed rest. Asked about some of these incidents on cross examination, he remembered only the fall at the store. Tr. at 55.

At some point, Mr. Tappa relocated out west for employment for about two years. He first worked in Wright, Wyoming, where he performed pipe welding at docks. He then worked at Black Sunder Coal Mine. He then returned to Wisconsin, where he did some welding on his own, and was laid off for not quite a year when he took a job at a fabrication shop in Green Bay. Tr. at 19-20.

Mr. Tappa also worked for various contractors as a structural welder on tug boats at Allendale Shipyard in New Orleans between 1990 and 1994. The only work injuries he sustained during this time period were “bumps and bruises.” He testified that he never had any difficulties with employers as far as the quality of his work. Tr. at 26-28.

Eventually Mr. Tappa returned to Wisconsin to assist his mother who had been diagnosed with brain cancer. Meanwhile, his son and daughter continued to live in the New Orleans area, and, had it not been vital that he move back to Wisconsin, Mr. Tappa testified that he would have continued working at the shipyard there. Tr. at 28. His plan in moving back to Wisconsin was to take care of his mother, working as a welder when he had to. He testified that he took care of his mother himself until it became necessary for him to start working for financial reasons, so he hired someone to stay with her. In September 2000, Mr. Tappa’s mother passed away. Tr. at 29.

In June or July 2000, Mr. Tappa became employed by Marinette Marine as a pipe welder working on Coast Guard tugboats. When first asked, he said he generally did not have any physical difficulties in performing his welding duties. Tr. at 29. Later, however, he said about three weeks to a month before his October 15, 2001, injury, he had pulled a muscle lifting a gas tank out of the welder. He received no medical attention for that incident, but he did report it, as everything had to be reported. Tr. at 33-34.

His work injury at issue in this claim happened while he was welding on October 15, 2001. Tr. at 34. He described what happened as follows:

George was a fitter, I was working with him that day and he carried a brass valve up he claims were all tied up, and stepped through the section and there was a four-foot drop and all the pipes. So, he went to step in on the pipe and started to slip. So, I stepped over and grabbed the valve, turned and stepped over some pipes and walked with it about six-foot and set it down where I had to weld it in.

Tr. at 36. He said that the valve weighed between 100 and 150 pounds; he testified that in performing his welding duties at Marinette Marine, he was regularly required to lift and carry 50-100 pounds. Tr. at 34, 35, 36. After this incident, Mr. Tappa experienced “what would normally be muscle strain, aching.” He further testified: “But after I got under the pipe, I was welding and

then I had to have help getting me up a short time later. And I just thought it was a pulled muscle like you do lots of times.” Tr. at 36.

Mr. Tappa testified that his medical treatment for the October 15, 2001 work injury began with Dr. Simpson, the shipyard physician at Marinette Marine. Tr. at 36; CX 1. On the day of the accident, Dr. Simpson provided him with pain pills. Thereafter, he continued to work on light duty. For two weeks after the accident, he continued to work with restrictions. Notwithstanding the pain pills and light duty, his pain level and symptoms worsened. Tr. at 37. As a result, he went to see his own physician and was eventually referred to a specialist in Green Bay. Tr. at 37-38; CX 2. The specialist took him off work for a week and prescribed anti-inflammatories. When he did not get better, the specialist took him off work for another week. By the third or fourth week, the specialist referred him to Dr. Weinshel, a neurosurgeon. Tr. at 38.

In January 2002, Dr. Weinshel performed surgery. Tr. at 38-39; CX 3. After the surgery, Mr. Tappa noticed a significant difference in that he no longer had constant leg pain. He said the surgery did exactly what Dr. Weinshel said it would do. Although he still had back pain after the surgery, Dr. Weinshel had warned him that nothing could be done about that. Tr. at 39. On cross examination, Mr. Tappa testified that Dr. Weinshel had not explained why this was so, but seemed to recall Dr. Weinshel mentioning something about scar tissue. Tr. at 59-60.

Mr. Tappa testified that after the surgery, he was referred to Dr. Merritt. Tr. at 40; EX 4. Dr. Merritt provided various forms of physical therapy. Tr. at 39-40; CX 1. He said that while these efforts made no difference with respect to his back pain, they did distract him. Dr. Merritt also prescribed various forms of medication for Mr. Tappa, including Vicodin, muscle relaxers, and sleeping pills. According to Mr. Tappa, after a while, the medications stopped working. Dr. Merritt then prescribed OxyContin, which seemed to help. Tr. at 40.

Mr. Tappa testified that OxyContin helped insofar as it dulled the pain and allowing him to move a bit more. Tr. at 40. In response to a question from his counsel, Mr. Tappa indicated that he had been accused of abusing the OxyContin. Mr. Tappa said when he had plans to go down South for a month or two, he was given a three month supply of OxyContin by Dr. Merritt. Tr. at 40-41. He did not go, however, and 60 days later, Dr. Merritt gave him another prescription for a stronger dose. When Mr. Tappa had that prescription filled, there was an allegation that he “faked the prescription or double-dipped on it.” Mr. Tappa claimed that he took all of his pills over the appropriate period of time, never gave the pills to anyone else, and did not take more than the doctor had advised him to take. Tr. at 41-42. On cross examination, Mr. Tappa testified that he could not recall whether he had ever told Dr. Merritt about his alcohol problem, but he said that he would not have denied it if it came up. He testified that, while no one had talked to him about the combination of alcohol and OxyContin, he knew that it was not good to mix them. Tr. at 61. He was stopped for drinking and driving in September 2003; at that time, he was also taking OxyContin. Tr. at 61-62.

At some point in time, Dr. Merritt relocated and Mr. Tappa stopped seeing him. Instead, he began seeing Dr. Merritt’s partner, Dr. Guo. Tr. at 42; CX 6. Dr. Guo advised that he would start cutting the doses of medication. Mr. Tappa, concerned about this approach, discussed with

Dr. Guo his need for a replacement medication in the event that his dosage of OxyContin was to be cut. Dr. Guo advised Mr. Tappa that he could talk to another doctor if he was unhappy with this approach. Tr. at 42-43. At the hearing, Mr. Tappa said he eventually spoke to another physician; however, nothing seemed to come of this, and Mr. Tappa testified that he had no choice but to heed Dr. Guo's recommendation to decrease the OxyContin. Tr. at 42-43, 60.

At the time of the hearing, Mr. Tappa was still taking OxyContin, though his dosage had been decreased to 20 milligrams, two times per day. Tr. at 30, 43. His largest dosage, which he had been taking about four months prior to the hearing, was 80 milligrams, three times per day. Tr. at 43. Mr. Tappa testified that since his dosage of OxyContin was decreased, his pain was much worse, and his lack of movement was back to where he started. Tr. at 43-44. Mr. Tappa testified that his doctors had tried other procedures such as shots and nerve blocks to alleviate his pain. Tr. at 45-46. Mr. Tappa testified that he planned to continue treatment with Dr. Guo and wished to go forward with the procedure recommended by Dr. Guo, which he hoped would help him. Tr. at 46, 48, 53.

At the hearing, Mr. Tappa testified that he was in a fair amount of physical discomfort. Tr. at 29-30. On a 1 to 10 scale, he had a constant and continual pain level of 7 ½ to 8. Tr. at 30. In terms of performing his activities of daily living, such as cooking, cleaning, and personal hygiene, Mr. Tappa testified that he could not sweep the floor or vacuum, but he could keep himself clean. Tr. at 31. He testified that his sister assists him, and his landlord vacuums and dusts approximately once a month. Tr. at 31-32. Mr. Tappa testified that he sees his brother, who had driven him to the hearing, usually at least once a week. He also has other family members who would assist him with financial matters and chores, if and when he needs assistance, but not on a consistent basis. Tr. at 32.

At the time of the hearing, Mr. Tappa's driver's license had been revoked or suspended by the state of Wisconsin. Tr. at 48, 58. This occurred sometime in October 2003, a month after he was charged with his sixth offense for Operating While Impaired ("OWI") by alcohol when his blood test results became known. Tr. at 58-59. He did not know when he would get his driving privileges back, but testified that it could be up to three years or more. He did not think he could get occupational driving privileges. Tr. at 48.

Mr. Tappa testified that he had been avoiding alcohol and indicated that, since his last ticket for drunk driving in 1997, the last time he consumed alcohol was a month or two before the hearing. Tr. at 30. Asked about the incident which led to the loss of his license, he stated that the potential penalty he would face for being was six months to six years. He testified that in connection with his OWI violations, he had been assessed for alcohol addiction and went through AA. Mr. Tappa claimed, however, that he was "back on the wagon." Tr. at 44-45. On cross examination, Mr. Tappa was asked whether he believed he had an addiction to alcohol. Mr. Tappa stated that he believed he could not drink for any reason. Mr. Tappa further admitted that he could not recall what had happened when he was arrested. He was not aware of how many drinks he had consumed at that time. Tr. at 62.

Mr. Tappa was not a good historian and there were gaps and inconsistencies in his testimony, making it difficult to reconstruct the sequence of events. He said he had been having

memory problems and had learned in the last month that one of the side effects of his medication was memory loss. Tr. at 31, 69. His understanding, however, was that the side effect related to short term memory only, though he had been experiencing difficulty with both short term and long term memory. Tr. at 31, 69. He said he had a good memory when he was younger, but started noticing problems for about the past year. Tr. at 72-73. Mr. Tappa first started noticing his memory problems with regard to little things, such as forgetting to return a call, forgetting to lock the house, forgetting to shut off the lights, forgetting that he had just talked about something he had spoken of the day before. He had not studied his medical records at all for the hearing and since he began taking OxyContin, his memory regarding his remote medical history had declined. Tr. at 73. Although he was decreasing his OxyContin, he had not yet noticed any improvement in his memory. Tr. at 73-74. He agreed that he may have left out some of his criminal convictions from his testimony, including convictions for retail theft (he drank out of a bottle of alcohol and put it back), and felony escape. Tr. at 74. The record as a whole supports the conclusion that Mr. Tappa has minimized his use of alcohol and medication, and exaggerated his symptoms from his back injuries. Nonetheless, the fact remains that he has had several accidents and two surgeries on his back, and his treating physicians have limited him to sedentary work for a maximum of four to five hours per day. All in all, although he attempted to put himself in the best possible light, I find that he was generally truthful about the material events affecting his claim.

Marinette Marine paid Mr. Tappa temporary total disability from October 27, 2001, to October 11, 2002, at a rate of \$287.73 per week. The Employer/Carrier retained a vocational expert, Sarah Holmes, to perform a labor market survey to determine whether there were jobs Mr. Tappa could perform. Her report and testimony are described below in the discussion of suitable alternate work. Ms. Holmes identified five jobs she thought Mr. Tappa could do, and obtained Dr. Merritt's approval that they met the restrictions he had imposed. On October 12, 2002, after Ms. Holmes obtained clearance from Dr. Merritt for the jobs she had identified, Mr. Tappa's compensation was reduced to permanent partial benefits at a rate of \$47.73 per week. EX 7:1-2.

Mr. Tappa testified that the insurance carrier had sent him a list of five "phone type jobs" and "selling different things." Tr. at 49. At the hearing, he could not remember the names of the jobs, but said he had contacted all five of them; two or three in person and the other two or three by telephone. Tr. at 49, 64-65. One of the jobs involved selling log homes for a trailer house company. Tr. at 49. He testified that when he inquired about the job duties of this position, he learned that he would be showing people the homes. Tr. at 51. He believed that he would have difficulty with the physical aspects of the job. Mr. Tappa also testified that he had never done sales or any customer service work before. He nevertheless contacted the other jobs that were listed as customer service type jobs. For one of the positions, he would be sitting and selling by phone or computer. The position required six months of training in computer and office-related skills. Mr. Tappa testified that he does not have any computer skills; he used a typewriter in high school, but not since then. Tr. at 53.

Another one of the jobs, located in Oconto, involved assembling wire harnesses. Tr. at 49-50. Mr. Tappa testified that he had never done assembly type employment. He said that he spoke to someone about the job requirements in the context of his physical limitations and

gathered that he would not be able to do a job like that. Tr. at 50. He explained that he would need to lie down after a short period of time, and that he would have to be on the medication. He also noted that he would have to continually change position, but he did not think the job would permit him to do so. Tr. at 50-51.

Mr. Tappa testified that had he not been experiencing such pain, his vocational plans would have been to continue doing what he had been doing. He further suggested that he would be willing to try to work if his pain lowered to the point where he could work. However, he did not have any type of plan in that regard. Tr. at 53.

The Claimant also retained a vocational expert, Linda Schmidt Goss, who testified in rebuttal to the Employer/Carrier's vocational evidence. She testified to the effect that she did not believe Mr. Tappa would be able to work except in a sheltered environment. Her testimony is also described in detail below in the discussion of suitable alternate work.

At the time of hearing, Mr. Tappa was receiving Social Security disability and workers' compensation benefits. Tr. 32-33.

Medical Evidence Pertaining to Prior Injuries

On December 15, 1980, Mr. Tappa was seen at St. Vincent's Hospital in Green Bay, Wisconsin after being hit in the head with a beer bottle and a pool cue during an altercation. X-rays of his skull were normal, and there was no fracture. EX 1.

Mr. Tappa went to St. Mary's Hospital on March 24, 1984, after falling down some stairs at Sanger Powers. EX 2; EX 3:38-50. He had been carrying a 55 gallon empty drum when he fell down the stairs. CX 2:41. He reported having fallen 20 to 30 feet, suffering a severe shock when he struck the bottom landing, resulting in sudden pain in his spine, and inability to walk, as a result of which he lay there about an hour before getting help. He had lacerations, abrasions, contusions, and a headache, as well as back and leg pain. Asked about his medical history, he reported a fracture in his spine about three years before, and a gunshot injury. X-ray of the spine showed a significant compression fracture of L3. Other x-rays showed metallic foreign body fragments, but no fractures. EX 2:7-8. CT scan revealed the effects of the old fracture as well as the new, with some anterior displacement of the rim. EX 2:9. The admitting diagnoses were acute lumbosacral strain secondary to a fall, with compression fracture at L3 creating new compression fracture; a history of fracture of L3 about three years back; and chronic obstructive pulmonary disease. EX 2:3. During his stay at St. Mary's Hospital, Mr. Tappa was seen by Dr. J. C. Sarnecki for the first time. Dr. Sarnecki gathered Mr. Tappa's old medical records, performed a CAT scan, a myelogram, and an EMG. The CAT scan was "unremarkable except for the compression fracture," the myelogram "did show pretty significant evidence of stenosis at L4-5," and the EMG "showed at least some evidence of L4 root involvement in the paraspinals." CX 2:41. Mr. Tappa was discharged from the hospital on March 28, 1984, when he returned to the reformatory. The doctor who completed the discharge summary wrote, "His back is definitely exacerbated by the fall." EX 2:6. One of the doctors seen in consultation, Dr. Bressler, said that his CAT scan was definitely abnormal, so he should be treated conservatively,

rather than through surgery. He was to be brought in as an outpatient for continued therapy. EX 2:6.

On January 1, 1985, Mr. Tappa underwent CT scan and EMG at Theda Clark Regional Medical Center ("Theda Clark") in Neenah, Wisconsin. CX 2:55; EX3:14. The results of the CT scan, signed by Dr. L.L. Bauer, show that Mr. Tappa had: (1) Healing compression fracture of L3; (2) No evidence of a disc herniation; (3) Mild degenerative changes within the lower lumbar spine. CX 2:56; EX 3:97. The EMG was essentially normal except for some findings suggestive of mild left L4-5 root involvement which was not definitive and should be clinically correlated. CX 2:58; EX 3:99.

On April 29, 1985, a myelogram was taken at Theda Clark. CX 2:50; EX 3:55, 90, 94. The radiologist's impression was "Abnormal myelogram with external pressure defect on the contra column at L4-5. The differential diagnosis would include protruding inner vertebral disc. Spinal stenosis would have to be considered." EX 3:94. Dr. Sarnecki's findings were "primarily a circumferential stenosis although most prominent from anterior at the L4-5 level." Thus, his post-operative diagnosis was the same as his pre-operative diagnosis, "with mostly stenosis and some evidence of bulging disc at lumbar 4-5." EX 3:95.

On April 30, 1985, Dr. D.B. Derozier of Theda Clark conducted a psychological consultation with Mr. Tappa, who had been referred for psychological profiling by Dr. Sarnecki, due to his unresolved back pain. Dr. Derozier observed that Mr. Tappa was a poor historian with a tendency to rationalize his behavior. He said that Mr. Tappa demonstrated a long history of antisocial behavior and behavior adjustment problems going back to childhood, with poor judgment, lack of persistence in interpersonal relationships, vocational instability, episodic alcohol abuse, and general unreliability. Dr. Derozier diagnosed a personality disorder with a guarded prognosis for future adjustment. CX 2:47-49; EX 3:18, 91-93.

Mr. Tappa underwent surgery on June 5, 1986, consisting of decompression, exploration of nerve roots, and excision of the disc, for spinal stenosis and disc herniation at the L 4-5 level. The record contains several medical reports regarding the surgery from Theda Clark, signed by Dr. Sarnecki. CX 2:41-44, EX 3:3-4, 7, 86-87, 89. According to the June 10, 1986 discharge summary prepared by Dr. Sarnecki, Mr. Tappa had been admitted to the hospital for back and leg pain. His discharge diagnosis was "lumbar 4,5 spinal stenosis and degenerating, but not really herniation of the disc at that level." The discharge summary noted that, while Mr. Tappa's post-operative course had been otherwise uneventful, he did "request more narcotic and for a longer period of time than average," though there was "no organic explanation for why he should be having more pain" (i.e. his wound looked excellent and he was afebrile). Finally, against hospital advice, Mr. Tappa signed himself out of the hospital on the fifth post-operative evening. CX 2:38; EX 3:5, 83.

Mr. Tappa underwent a myelogram and CT scan at Theda Clark on October 16, 1986. The myelogram showed that Mr. Tappa had "no interval change in appearance of the localized spinal stenosis at the L4-5 level, as well as the healing compression deformity of L3." CX 2:36; EX 3:82. CT scan taken at the same time showed findings consistent with the myelogram suggesting spinal stenosis. It also showed density about the thecal sac thought to represent scar

tissue, some concentric bulging of the L4-5 disc anteriorly, and the healing compression fracture of L3. CX 2:34-35; EX 3:80-81.

Medical records from Theda Clark, dated April 23, 1989, show that Mr. Tappa slipped and fell at Fleet-Farm, landing on his buttock. CX 2:30; EX 3:34, 76. He was in moderate pain but able to ambulate from the store. Later, at home, he was walking downstairs when he fell and struck his forehead, sustaining an abrasion. There was no loss of consciousness; however, he also suffered an abrasion of his left anterior chest. A “marked antalgic gait and curvature of the lumbar spine to the left” were noted. The records also note that Mr. Tappa moved “very uncomfortably on the examination table.” An examination of Mr. Tappa’s back revealed a “slight scoliosis with convexity to the right.” There was “left paraspinous muscle spasm present.” The records also note that “[x]-rays reveal a previous laminectomy scar at L4-5,” “an old compression fracture with anterior limping of the inferior portion and spurring of the L3 vertebrae,” and “approximately loss of height of 50% from this old injury.” Mr. Tappa was given Demerol and Phenergan and was “much relieved by this.” He was to be sent home with bed rest and re-examined in 2-3 days. CX 2:31; EX 3:35, 77. An x-ray revealed these findings: “Views of the lumbosacral spine are compared with previous views from a myelogram dated 10/16/86. There is an old compression fracture with associated hypertrophic change involving L3. There is a scoliotic deformity to the lumbar spine convexed to the right, centered at the L3 vertebra unchanged from previously. No new fractures are seen.” CX 2:32; EX 3: 78.

Medical records from Theda Clark, dated April 27, 1989, show that Mr. Tappa had been “sitting on the couch to tie his shoe” when his “left flank muscle developed a severe spasm” and he had a “fall on cement floor.” Dr. Sarnecki was consulted, who said he would see Mr. Tappa in his office the next day. CX 2:26; EX 3:31,72. The ambulance record states that Mr. Tappa was found “laying on his right side” and that he had “left sided lumbar pain” and a “long standing history of chronic back pain.” CX 2:28; EX 3:29, 74.

There are no further records of treatment for Mr. Tappa’s back in the record until his injury while working at Marinette Marine, over ten years later.

Medical Evidence Pertaining to October 15, 2001 Injury

Dr. Charles Simpson of the Bay Area Medical Center first saw Mr. Tappa on October 16, 2001, the day after his injury. In his occupational health report, Dr. Simpson stated that Mr. Tappa felt pain in his lower back after he picked up a 150 lb. valve without assistance. The pain increased markedly over the next several hours. The pain “radiates down left hip to the mid calf of the left leg.” He noted a history of low back injury in 1986 for which he was hospitalized for two weeks at that time. He also noted a history of fractured disks in the lumbosacral spine with surgery in the early 1970s. The results of Dr. Simpson’s physical examination were as follows: “He has a marked antalgic gait. Any flexion causes pain. Some marked rotoscoliosis at this point. Marked lumbar muscle spasm, positive straight leg raising on the left leg. Very rigid posture. Cicatrix on the midline of the lumbar region consistent with surgical history.” CX 1:3. Dr. Simpson’s assessment was that Mr. Tappa had “low back strain with radiculopathy.” He sent him home for the day. CX 1:4. The record contains similar Occupational Health Reports from

Dr. Simpson throughout that week; he released Mr. Tappa for light duty with work restrictions beginning October 17. *See* CX 1:5-11.

An October 29, 2001 radiology report by Dr. Edward Wineck from Bay Area Medical Center, includes the following impressions:

- (1) Multilevel discogenic disease/spondylosis is noted. A moderate anterior wedge compression involving the L3 vertebral body is present; only mild marrow edema is noted within body, suggesting that the deformity is relatively remote. The remaining vertebral body heights are relatively maintained as are the intervertebral disc spaces.
- (2) There appear to be postsurgical changes in the posterior elements at the L4-L5 and L5-SI levels. Apparent enhancing scar is noted at the margins of the thecal sac at these levels.
- (3) L4-L5: Residual or recurrent broad based disc bulge eccentric to the left as well as moderate bilateral facet joint hypertrophy. The lateral recesses are narrowed bilaterally with equivocal impingement of the emerging L5 nerve roots, somewhat more likely on the left. Neural foraminal narrowing is also present without definite impingement of the traversing roots.
- (4) L5-SI: Residual/recurrent broad based disc bulge as well as moderate facet joint hypertrophy. The left lateral recess is narrowed with equivocal impingement of the emerging left SI nerve root. Mild bilateral neural foraminal narrowing is also present without definite associated impingement. There are equivocal nondisplaced parts interarticularis defects at the L5 level versus volume averaging with osteoarthritis facet joint change.
- (5) L5-SI: Residual/recurrent broad based disc bulge as well as facet joint hypertrophy. The left lateral recess is narrowed with equivocal impingement of the emerging left S1 nerve root. Mild bilateral neural foraminal narrowing is also present without definite associated impingement.
- (6) Mild to moderate diffuse disc bulges with mild facet joint hypertrophy are noted at L2-L3 and L3-L4. There is equivocal associated impingement of the emerging L3 nerve roots at L2-L3 and equivocal associated impingement of the emerging L4 nerve roots at L3-L4.
- (7) No intrinsic abnormality of the distal cord is identified; no abnormal enhancement is seen. The conus is near the T12-L1 level.

CX 3:117-118, 119-120.

On October 30, 2001, Mr. Tappa called to say that he would not be returning to the Bay Area Medical Center, as he would be going to his own physician. CX 1:13. Mr. Tappa went to

Dr. S. J. Kumar, an internist, who took an MRI which showed “disc herniation at L2-3, L3-4, L4-5, and L5-SI with multiple facet joint hypertrophy and possible nerve root impingement at L4-5 and L5-S level towards the left.” On October 31, 2001, Dr. Kumar then referred him for further evaluation by Dr. Steven Weinshel, a neurosurgeon at the Baycare Clinic. CX 2:20, 21-22; CX 3:1, 7. Mr. Tappa underwent physical therapy under Dr. Weinshel’s supervision from November 2, 2001, to January 10, 2002, but he did not make any progress. CX 3:11.

A November 13, 2001 note by Dr. Weinshel indicates that Mr. Tappa had been experiencing back pain radiating into his left leg. Mr. Tappa reported he had developed neck pain in the week prior but was unsure of the relationship to this injury. A review of the MRI scan from Bay Area Medical Center showed possible disk herniation at L4-5 and L5-SI and that Mr. Tappa’s nerve roots could be displaced due to a combination of disk herniation and “probably some epidural fibrotic material.” However, without knowledge of his past operation, it was difficult for Dr. Weinshel to draw a conclusion. Dr. Weinshel noted that, while Mr. Tappa had tried physical therapy to alleviate his current problem, the physical therapy actually made his pain worse. Mr. Tappa had been off of work and taking Vicodin with some pain relief. In addition, Dr. Weinshel made mention of Mr. Tappa’s back operation at Theda Clark in 1985, but indicated that the pertinent medical records had not yet been forwarded. Dr. Weinshel’s impression was that Mr. Tappa was “not responding with time and physical therapy” and “may need an operation to decompress the L5 and S1 nerve roots.” Mr. Tappa was scheduled for a second opinion with Dr. Tushar Goradia, a neurosurgeon with the Prevea Clinic, and given a prescription for Vicodin and an off-work slip for a month. CX 2:18, CX 3:145, 146.

A November 19, 2001 Worker’s Compensation Report prepared by Kelly Ells, a nurse practitioner in neurosurgery with the Prevea Clinic, recommended that Mr. Tappa return to “light work” on November 19, 2001. She also suggested that Mr. Tappa would benefit from “continued conservative treatment, including high-dose inflammatory, nighttime muscle relaxant, narcotic only as needed for pain, continued physical therapy, and an epidural injection at L4-5 with a possible repeat injection.” CX 2:6-9; CX 3:3-5, 19-20.

On November 27, 2001, the Employer/Carrier sent a form for Dr. Weinshel to fill out, to determine Mr. Tappa’s restrictions in order to place him in a temporary accommodating position. CX 3:6.

At the request of Dr. Weinshel, Dr. Danzhu Guo saw Mr. Tappa in consultation on December 6, 2001, to see if there was any nonoperative therapy which would help him. CX 3:140-141, 142. Dr. Guo performed an electrodiagnostic study on December 12, 2001. CX 3:110-116. Dr. Guo concluded that there was no electrodiagnostic evidence of a peripheral polyneuropathy or lumbosacral radiculopathy in the muscles and nerves tested. CX 3:109. Dr. Weinshel and Dr. Guo both certified Mr. Tappa to be totally incapacitated. CX 3:138, 143.

Mary Ann Dobbs, a case manager with Concentra Managed Care Services, Inc., who was working in conjunction with the Carrier, sent Mr. Tappa’s records to Dr. Goradia, and inquired whether the lifting incident on October 15, 2001 “caused a temporary aggravation of Mr. Tappa’s re-existing low back condition or whether [it] may have accelerated the pre-existing condition, or even caused additional damage”; whether he agreed with recommended courses of

treatment; and whether he agreed that Mr. Tappa could return to work in light duty. CX 2:16. On December 24, 2001, Dr. Goradia wrote back, indicating he had reviewed Mr. Tappa's records and imaging studies, and the report from Ms. Ells. He said that based on Ms. Ells' evaluation, Mr. Tappa appeared to have "weakness in his left leg associated with pain, though his deep tendon reflexes are symmetric and brisk, especially in the patellars and Achilles." Dr. Goradia noted that Mr. Tappa had postsurgical changes seen on his MRI, as well as "an old L3 compression fracture." He stated: "More notably, there is evidence of possible recurrent disk herniation at L4-5 and disk herniation at L5-S1 on the left side." Dr. Goradia opined that, given Mr. Tappa's symptoms, it was reasonable to perform a repeat exploratory surgery to decompress the L5 and S1 nerve roots, as Dr. Weinshel suggested in his November 13, 2001 note. Dr. Goradia agreed with Ms. Ells' recommendations regarding treatment. Dr. Goradia stated:

Unfortunately, I cannot tell you for certain whether the lifting incident accelerated a pre-existing condition or caused additional damage. The fact that the patient reports pain shortly after a traumatic twisting of his back from lifting a heavy valve suggests that at least the pain symptoms are related to that event. However, the abnormality seen on MRI may have been present even prior to the lifting incident and therefore, I am unable to give you a certain causation.

CX 2:14; CX 3:27. Finally, he also agreed with Ms. Ell's recommendation that Mr. Tappa could return to work on light duty. CX 2:15; CX 3:28.

On January 15, 2002, Dr. Weinshel recommended a two-level lumbar discectomy. CX 3:134. He considered Mr. Tappa to be totally incapacitated. CX 3:135. On January 24, 2002, Dr. Bryan Pereira, a neurosurgeon with the Prevea Clinic, saw Mr. Tappa to give a second opinion at the request of Dr. Weinshel. Dr. Pereira described Mr. Tappa as having had "multiple injuries involving his back" that include "a compression fracture, lumbar laminectomy done a couple of years ago, and a history of multiple work-related injuries to his low-back region." Dr. Pereira took a history, conducted a physical examination, and reviewed the MRI of the lumbar spine, which showed evidence of a congenital spinal stenosis. There was also evidence of disk bulging, with a foraminal stenosis secondary to a disk bulging on the left at L4-5, L5-S1. Dr. Pereira agreed with Dr. Weinshel's assessment and plan for surgery. CX 2:3-4; CX 3 8-10.

Dr. Weinshel operated on Mr. Tappa's back on January 28, 2002. CX 3:101-105. Dr. Weinshel's January 29, 2002 discharge summary from Aurora BayCare Medical Center in Green Bay, Wisconsin, stated that Mr. Tappa had experienced "good relief for his leg pain" following the operation, which consisted of "left L4-5 and L5-SI discectomy." It further stated that at the time of discharge, Mr. Tappa was ambulating well. CX 3:100. After the surgery, Mr. Tappa again participated in physical therapy. CX 3:21-22. Eventually, however, on March 28, 2002, the therapist recommended it be terminated after he demonstrated a decline in motion, and was not tolerating the treatments well. CX 3:42.

On February 26, 2002, Dr. Weinshel completed a Marinette Marine Light Duty Work Restriction Evaluation, indicating that Mr. Tappa was unable to work at all. CX 3:129. A report generated that same day by Dr. Weinshel indicates that Mr. Tappa had returned one month out after his lumbar discectomy at left L4-5 and left L5-SI, claiming that 90% of his leg pain was

gone, though he continued to have back pain. CX 3:130. Mr. Tappa requested more Oxycontin; Dr. Weinshel allowed one more prescription but told Mr. Tappa that he could not stay on this medication indefinitely. CX 3:130.

On March 26, 2002, Dr. Weinshel reported that Mr. Tappa's pre-operative leg pain was gone, but he had considerable back pain and additional leg pain. CX 3:160. An x-ray and an MRI were taken at the request of Dr. Weinshel on April 1, 2002. The radiologist, Dr. Edward Wineck, compared the x-ray film to the one taken October 29, 2001. His impression was:

1. A moderate anterior wedge compression deformity involving L3 is again noted. Anterior osteophyte formation is also seen. A mild associated reversal of lumbar lordosis is also noted; the alignment is otherwise within normal limits. There also appears to be a mild anterior wedge compression deformity involving T11.
2. Hypertrophic and sclerotic changes are present in the posterior elements at L5-S1.

CX 1:37, 124, 127. His impression from the MRI was:

1. Recent surgical changes are noted on the left at L4-5 and at L5-S1; enhancing scar is noted at the margins of the thecal sac at the postsurgical levels, most prominent laterally. Residual postsurgical edema and enhancement are noted in the left paraspinal musculature as well as along the posterior midline incision. No discrete fluid collection to suggest an abscess is seen. Scar surrounds the emerging nerve roots at the postsurgical levels. No significant residual or recurrent left-sided disk material is seen to suggest nerve root impingement at the level of the lateral recesses. Some bilateral neural foraminal narrowing persists without definite impingement of the traversing nerve roots.
2. Broad-based disk bulges are again noted at the L2-3 and L3-4 levels without definite interval change or associated impingement.
3. A moderate anterior L3 compression deformity is again noted, unchanged. The remaining vertebral body heights are maintained. There is a mild associated reversal of lordosis.
4. No intrinsic abnormality of the distal cord is identified.

CX 3:38, 125, 126. On April 13, 2002, Dr. Weinshel notified Mr. Tappa that based on the MRI, the operation to free up the nerves to the legs was successful in terms of correcting the problem shown on the earlier scan. CX 3:158.

Dr. Weinshel referred Mr. Tappa to the Baycare Clinic for Rehab Medicine for evaluation and management of ongoing lower back and buttocks pain. EX 4. In a report dated April 30, 2002, Dr. John Merritt took medical, family and social histories, and reported that Mr. Tappa was taking Vicodin and Flexiril, and using a TENS unit. He conducted a physical examination, reporting marked limitation of motion of the lumbar spine, antalgic gait and stooped posture. Dr. Merritt's diagnoses were lumbar disk herniation at L4-5 and L5-S1;

postoperative laminectomy, discectomy and foraminotomies at L4-5 and L5-S1; postoperative arachnoiditis; L4-5 and L5-S1 radiculopathy; degenerative joint disease of the lumbar facets; severe truncal spasm and contractures; pain sleep disorder; and immobility due to deconditioning. The stated plan was to use OxyContin for pain control on a regular basis, Amitriptyline to help his sleep at night, Bextra in order to enhance narcotic effect, pool therapy, a traction program at home including bar hanging, chair press-ups and chair sitting stretches of his lumbar spine. CX 3:148, EX 4:2. Mr. Tappa was also fitted for a pneumatic distraction vest. He was given an off-work slip estimating four to six weeks to begin the program, hoping to go back to work on a limited basis thereafter. EX 4:3. Dr. Weinshel saw him the following day and recommended that Mr. Tappa work with Dr. Merritt for the next few months. CX 3:151.

Mr. Tappa attended an initial physical therapy evaluation on May 9, 2002. CX 1:45-48; CX 3:32-35. The stated plan was to initiate a trial of aquatic therapy three times per week for three weeks. CX 1:48; CX 3:35. However, a May 23, 2002 physical therapy discharge summary stated that Mr. Tappa was not having significant relief with aquatic therapy, and though he did have relief of symptoms with ultrasound, it was not a long lasting result. Mr. Tappa was interested in continuing physical therapy for ultrasound only, and was somewhat upset with plans to discharge him, but did not tolerate any exercise activities during physical therapy. The therapist thought it inappropriate to continue his aquatic therapy, since he had not met any of his long term or short term goals. CX 3:31. On May 24, 2002, he returned for "land" physical therapy after the aquatic trial failed. CX 1:56; CX 3:44. May 24 and May 29, 2002 physical therapy weekly progress summaries indicated that, overall Mr. Tappa had "not made significant improvements in functional mobility or reduced pain with two-week aquatic therapy intervention," and recommended discharge from therapy, or continued aquatic therapy. CX 1:56, 57; CX 3:44, 45.

On May 30, 2002, Ms. Dobbs, the case manager for Concentra, wrote to Dr. Merritt inquiring whether he would be amenable to an additional four weeks of aquatic therapy, or an immediate functional capacity evaluation, providing an assessment of maximum medical improvement, permanent partial disability and permanent work restrictions. She said his employer could provide sedentary duties, with the flexibility to change positions at will. She requested an opportunity to speak to Dr. Merritt before his follow-up evaluation scheduled for June 11. CX 3:29.

A June 3, 2002 follow-up evaluation with Dr. Merritt recorded that Mr. Tappa was "motivated to push forward" with his therapy program "in spite of the pain." His OxyContin dosage was adjusted and he was warned of potential abuse signs to look for. A possible return to work on a limited basis and after four more weeks of therapy was discussed. Dr. Merritt planned to do a limited functional capacity evaluation ("FCE") to prescribe appropriate work restrictions. CX 1:41-44, CX 3:166, EX 4:4.

A June 24, 2002 physical therapy discharge summary indicates that Mr. Tappa stated he had "not felt any reduction in back or left lower extremity radicular symptoms or improved mobility or strength with physical therapy aquatic exercise program." CX 1:69; CX 3:77. The stated plan was to discontinue therapy because there had been no progress toward the goals. It was also noted that Mr. Tappa was to complete an FCE that day. CX 1:70; CX 3:78.

Mr. Tappa's FCE was performed on June 24, 2002. The report indicated that Mr. Tappa was able to work at the Sedentary Physical Demand Level for a 4.0-8.0 hour day according to the Dictionary of Occupational Titles, U.S. Department of Labor. Mr. Tappa was unable to perform part of the tests, and refused to perform others. The functional strength deficit summary suggested that his injured area had returned to normal or near normal function, but might be unreliable since he failed to pass the validity profile for static strength testing. He "exhibited overt symptom/disability exaggeration behavior," and scores on some test protocols indicated "a non organic component to his pain, medical impairment and disability." He passed only 6 of 34 validity criteria, or 18%, which suggested

very poor effort or voluntary sub maximal effort which is not necessarily related to pain, impairment or disability. The combination of overt symptom/disability exaggeration, non organic signs and a significant number of failed validity criteria are thought to represent a conscious effort to demonstrate a greater level of pain and disability than are actually present.

CX 3:57-58; EX 8:1-2.

After July 1, 2002 follow-up, Dr. Merritt indicated that Mr. Tappa had done the home based exercises and therapy program but was still severely limited by back and leg pain. He further stated: "Although we know he has a herniated disk and postop arachnoiditis, he has less nerve tension signs on exam now but the evidence of facet contribution to the pain persists." Dr. Merritt referred Mr. Tappa to Dr. Ahmet Dervish to perform facet blocks, and if those produced significant pain reduction, possible radiofrequency rhizotomy. CX 3:165, EX 4:5.

Dr. Dervish provided injections on July 9, 2002. CX 3:97. A follow-up report from Dr. Merritt said Mr. Tappa did not have any lasting improvement from them. Dr. Merritt also reviewed the results of the FCE, which he said revealed significant pain during medium and light activity, and inability to perform materials handling kinds of activity. As a result of the FCE, Mr. Tappa was categorized for future training for sedentary work, initially with limited hours, and the ability to change position every 30 minutes. Dr. Merritt concluded, based on Mr. Tappa's lack of progress after a conservative program and injections, and his performance on the FCE, that his condition should be considered to be permanent. CX 3:170, EX 4:6. Based on the FCE, he would need sedentary work, with job training through vocational rehabilitation. CX 3:163, 170; EX 4:6. He "obviously will need job retraining through vocational rehab." CX 3:170, EX 4:6. Based on the 5th Edition of the AMA Guidelines, DRE Lumbar Category V, page 387, Dr. Merritt assigned a permanent impairment of the whole person of 28%. CX 3:171; EX 4:7.

On July 16, 2002, Dr. Weinshel indicated that Mr. Tappa could return to work with limited, permanent restrictions. Specifically, Mr. Tappa was allowed to perform "sedentary work," which meant "lifting 10 pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers and small tools." Dr. Weinshel further noted that, although a sedentary job is defined as one which involves sitting, a certain amount of walking or standing is often necessary in carrying out job duties." He further stated, "Jobs are sedentary if walking or

standing are required only occasionally and other sedentary criteria are met.” Mr. Tappa’s specific limitations were delineated as follows: In an 8-hour day, he was permitted to stand/walk for 1-4 hours, sit for 3-5 hours, and not drive at all. He was to change position every 30 minutes. He was permitted to bend, squat, and lift occasionally. He was not permitted to climb at all. CX 3:163.

A U.S. Department of Labor Work Restriction Evaluation completed by Dr. Merritt on July 31, 2002, CX 3:81, EX 4:8, indicated that Mr. Tappa was able to do the following: sit for 30 continuous minutes and 5 intermittent hours; walk for 30 continuous minutes and 2 intermittent hours; lift continuously only briefly, and for 1 intermittent hour; bend or twist only briefly; squatting, climbing, and kneeling were to be avoided altogether; and stand for 30 continuous minutes and 1 intermittent hour. Lifting was restricted to 0 to 10 pounds. There were no restrictions on hands, grasping, pushing and pulling, or fine manipulation. Mr. Tappa could not reach above the shoulder or operate a car, truck, crane, tractor, or other type of motor vehicle. However, he could use his feet to operate foot controls or for repetitive movement. Mr. Tappa was to avoid extremes of hot and cold. His interpersonal relations were not affected because of a neuropsychiatric condition. Mr. Tappa could not work 8 hours per day; he was limited to 4 or 5 hours per day. Dr. Merritt anticipated that Mr. Tappa would need occupational rehabilitation services, such as testing, counseling, training, or placement to return to work. Mr. Tappa had reached maximum medical improvement.

On October 3, 2002, the Employer/Carrier’s vocational consultant, Sarah Holmes, wrote to Dr. Merritt seeking his evaluation of some positions she had identified during her labor market survey. CX 3:71. On October 4, 2002, Dr. Merritt indicated his approval of all five positions identified by Ms. Holmes by marking “OK” with his initials by each one, adding at the bottom of the list, “Above jobs within his permanent restrictions.” CX 3:72-73, 85-86, 168-169; EX 4:9-10. As noted above, Marinette Marine reduced Mr. Tappa’s compensation benefits from total to partial disability on October 12, 2002. On October 14, 2002, counsel for Marinette Marine wrote to Dr. Weinshel to inquire as to his opinion whether Mr. Tappa’s prior injuries contributed to his disability. In unsigned responses to counsel’s questions, someone responded “yes” to the question whether the Mr. Tappa’s pre-existing condition materially contributed to his present impairment and disability, but “unknown” to the question whether the resulting permanent partial disability was materially and substantially greater than would have resulted from the recent injury alone. EX 3:69-70.

A November 12, 2002 procedure report by Dr. Merritt from Aurora BayCare Medical Center in Green Bay, Wisconsin, states that Mr. Tappa underwent a lumbar facet injection, bilateral L4-5 and L5-S1 under fluoroscopic guidance. Mr. Tappa tolerated the procedure well and there were no complications. CX 3:106.

On a January 6, 2003 Practitioner’s Report, Dr. Weinshel indicated that it was “probable” that Mr. Tappa’s October 15, 2001 accident directly caused his disability. CX 5. It was estimated that Mr. Tappa had 5% permanent partial disability for L4-5 discectomy, 5 % permanent partial disability for L5-S1 discectomy, and 5% permanent partial disability for continued back pain, resulting in a total of 15% permanent partial disability per Wisconsin state

statute, with a “guarded” prognosis due to Mr. Tappa’s continued significant low back pain. CX 5.

After a February 4, 2003 outpatient consultation examination of Mr. Tappa, Dr. J. Talbot Sellers, a physiatrist, said, “It is difficult to say what is causing his pain. He has difficulty even straightening his legs out. He does exhibit some pain behaviors and I am concerned with his limited mobility how much he may actually be doing at home.” Dr. Sellers recommended a new MRI. EX 5:5.

The radiologist’s report of a February 10, 2003 MRI examination made the following conclusions:

1. Degenerative disc disease at L2-3, 3-4, 4-5, and L5-S1.
2. Moderate anterior wedging of L3, stable from previous exam of 4/1/02.
3. Some posterior bilateral disc bulging at L4-5. No spinal stenosis or focal encroachment upon the lumbar spinal canal. Neural foramina are narrowed somewhat due to a combination of findings.
4. At the L5-S1 level, there has been postop changes on the left, but on the right, there appears to be some broad-based disc protrusion. This could possibly cause some right S1 nerve root symptoms. Neural foramina are narrowed bilaterally at this level, right greater than left. This could possibly cause some L5 nerve root symptoms.
5. Incidental note is made of some signal changes at various endplates; some of this is due to the L3 fracture. Some of it may be related to some degenerative disc changes at a number of levels. Note is made of a 1.5 cm area of abnormal high signal on a T2-weighted sequences, and low signal on T1-weighted sequences posterior body of T12. This abnormality is of unclear significance. It does not appear to be an aggressive lesion, although its exact etiology is unclear. It may be of no clinical significance.

EX 5:2-3.

In his February 11, 2003 follow-up report, Dr. Sellers noted that Mr. Tappa had had an MRI and was still experiencing some degenerative disc disease at L2-L3, L3-L4, L4-L5 and L5-S1, as well as some moderate anterior wedging at L3 from what appeared to be a previous compression fracture. There were some surgical changes noted on the left at L4-L5 and L5-S1. There also appeared to be a moderate right-sided disc protrusion at L5-S1, which caused some neural foraminal narrowing as well as on the left. At L4-L5, there also appeared to be some bilateral neural foraminal narrowing. He thought either one of these neural foraminal narrowings on either side could cause some symptoms that would account for Mr. Tappa’s radicular pain. Dr. Sellers’ impression was:

At this point, he is a difficult patient to read. He exhibits quite a bit of pain behavior, and I believe there is quite a bit of psychosocial component and overlay. He certainly seems to have quite a bit of pain, although I believe a lot of it is myofascial and soft tissue.

Dr. Sellers did not think that Mr. Tappa had “maximized his conservative therapy, primarily physical therapy.” As Mr. Tappa had already had one successful facet block, before considering rhizotomy, he recommended trying another block to see if it was successful. Because Mr. Tappa had some neural foraminal narrowing, with some steroid leaching out of the facets could cause some irritation in the nerve roots. If the facet blocks did not help, Dr. Sellers would consider selective nerve root blocks. EX 5:1.

On a May 9, 2003 Practitioner’s Report, Dr. Merritt indicated that it was “probable” that Mr. Tappa’s October 15, 2001 accident caused his disability by “precipitation, aggravation, and acceleration of a pre-existing progressively deteriorating or degenerative condition beyond normal progression.” CX 4:1. It was estimated that Mr. Tappa suffered from a 20% permanent disability of his spine/torso, with “marked limitation of motion, compromised gait, nerve root entrapment with pain, numbness, posterior straight leg raising and nerve tension signs, spasms and contractures,” with a “poor” prognosis. CX 4:2.

On May 9, 2003 Dr. Guo took over Mr. Tappa’s care because Dr. Merritt was leaving. Dr. Guo’s impressions were as follows: (1) chronic low back pain and possibly multifactorial contribution to his pain, including discogenic pain, facet joint pain, and other mechanical-related back pain; (2) Chemical-induced radiculitis associated with the previous HNP. His recommendations were as follows: (1) Mr. Tappa should proceed with radiofrequency rhizotomy, as recommended by Dr. Merritt, though this request was rejected by the insurance company; (2) OxyContin had been increased too fast for the past year from 40 mg twice a day to 80 mg three times a day. Mr. Tappa denied any side effects from OxyContin. Dr. Guo told Mr. Tappa that he did not intend to give any long-term care OxyContin for low back pain control. Will start to taper his OxyContin with 80 twice a day; (3) Encouraged to continue his home exercise program and apply ice packs or heating pads to back area for symptom control. He also needs to use his TENS unit intermittently for low back control. CX 6.

At a June 6, 2003 follow-up reassessment with Dr. Guo, most of the time was spent explaining to Mr. Tappa the risks of treating chronic back pain with long-term narcotics. He started Mr. Tappa on OxyContin 60 mg twice a day. At a July 17, 2003 meeting, Dr. Guo decided that he would give Mr. Tappa another month of OxyContin 60 mg but might decrease it to 50 mg at the next visit. At an August 25, 2003 follow-up reassessment with Dr. Guo, Dr. Guo determined that he would continuously cut down his narcotics to OxyContin 40 mg. He further felt that Mr. Tappa was a good candidate for another trial of a medical branch block for diagnostic purposes, and, if that helped, he might benefit from a radiofrequency rhizotomy for long-term symptom control. At a September 29, 2003 follow-up reassessment with Dr. Guo, Dr. Guo noted that Mr. Tappa had missed his scheduled radiofrequency rhizotomy secondary to driving under intoxication. Dr. Guo told Mr. Tappa that he would continue to taper his OxyContin to 30 mg twice a day, and the branch block was rescheduled. By the time of an October 28, 2003 follow-up reassessment with Dr. Guo, Mr. Tappa had had a bilateral L3, L4, and L5 medial branch block on October 9, 2003. While Mr. Tappa reported significant pain relief in low back area for about one to two days, the pain gradually returned to previous level. Dr. Guo recommended that, since Mr. Tappa had experienced good pain relief for a short term

from the medial branch block, he would be a good candidate for radiofrequency rhizotomy. Mr. Tappa was tapered to OxyContin 20 mg twice a day. CX 6.

On February 6, 2004, Ms. Dobbs, the Concentra Case Manager, wrote to Dr. Sellers asking him to “confirm that Mr. Tappa’s pre-existing disability and his last (10/15/01) employment-related injury resulted in a greater disability than he would have incurred from that last work-related injury alone.” Someone checked “Yes, I agree.” There is no signature from Dr. Sellers. EX 9.

Disability

Disability under the Act is defined as “incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment.” 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The parties have agreed that the Claimant has reached maximum medical improvement. Therefore, his disability is permanent.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). In this case, the parties also agree that Mr. Tappa cannot return to his former employment. Thus he is presumed to be totally disabled.

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). In this case, the parties agree that Mr. Tappa cannot return to his former employment. The Employer/Carrier relies on the testimony of its vocational expert to establish the existence of suitable alternative employment.

Vocational Evidence

Sarah Holmes, a vocational case manager with Concentra Integrated Services (“Concentra”) testified on behalf of the Employer/Carrier at the hearing. As a vocational case manager, Ms. Holmes assists injured workers in obtaining employment within their restrictions, performing labor market surveys, and providing vocational testing, assessments, and job analyses when requested. She earned a Master’s Degree in Rehabilitation Counseling from the University of Wisconsin, Madison, in December 1999. She also earned a Certified Rehabilitation Counselor (“CRC”) licensure in June 2001. She had been employed in the field as a vocational consultant since receiving her Master’s Degree in December 1999. Tr. at 79. On cross examination, she admitted that she is not registered with the U.S. Department of Labor as an assigned vocational consultant to assist individuals with vocational services for job placement. Tr. at 99. Her first position in the field was as a vocational consultant at a mental health facility. She had been working for Concentra since June 11, 2001. Tr. at 80.

Ms. Holmes testified that she had been requested to perform a vocational assessment of Mr. Tappa. Tr. at 80. She first met with him at the job center in Marinette where she performed a standard vocational interview assessment. This consisted of collecting information on Mr. Tappa’s medical history and socioeconomic status. Specifically, she gathered information on his living arrangement, finances, housing, interests and hobbies, as well as employment history, military information, education, certifications, training programs as well as behavioral and motivational information. Tr. at 80, 84.

In addition to the information collected, she also factored into her analysis Mr. Tappa’s functional capacity evaluation, which had been prepared at Bay Care and approved by Dr. Merritt, Mr. Tappa’s treating physician at the time. Tr. at 81, 83; EX 8. She characterized Mr. Tappa’s FCE as a thorough examination, notwithstanding that Mr. Tappa had refused to perform some of the testing during the evaluation. Tr. at 83. Ms. Holmes testified that Mr. Tappa’s FCE demonstrated him to be capable of working at sedentary activities. Tr. at 85. Finally, in addition to the background information and the FCE, Ms. Holmes testified that she typically considers “any additional information provided by the treating physician, in this case, Dr. Merritt.” Tr. at 82. To that end, Ms. Holmes testified that she had consulted with Dr. Merritt and presented him with information in the form of a labor market survey. Tr. at 83. She found that Dr. Merritt’s opinion was essentially consistent with the FCE. Tr. at 85-86.

Ms. Holmes explained that with the information she gathered from the vocational assessment interview, the FCE, and Dr. Merritt, she was able to perform an analysis of transferable skills. Tr. at 81. Utilizing a software program endorsed by the state of Wisconsin, she performed this analysis, in which she entered Mr. Tappa’s work history and adjusted for education as well as physical limitations. Tr. at 85. Ms. Holmes testified that her transferable skills analysis was included in the original assessment report, and at that time, she was asked to perform a labor market survey. To perform the labor market survey, she researched available jobs using the internet and the newspaper. She then contacted each employer and spoke with either a human resources representative or a manager to learn about the requirements of each job. Tr. at 86.

The record contains the results of Ms. Holmes' September 24, 2002 Labor Market Survey. It includes research conducted from August 27, 2002 through September 24, 2002. The following companies were identified as hiring for some positions within Mr. Tappa's restrictions and within a 50-mile radius of Mr. Tappa's residence in Peshtigo, Wisconsin:

- (1) Employer: Unlimited Services, Inc.
 Position: Assembler
 Requirements: Entry-level, electrical assembly, ability to sit/stand
 Wage: \$7.40 per hour, 0.25 cent raise in six months

- (2) Employer: Bay Area Homes
 Position: Home Sales
 Requirements: No experience required. Willing to train. Job duties include performing paperwork, making phone calls, and occasionally walking customers through the model homes.
 Wage: Commission based, Average first year salary \$25,000-\$40,000

- (3) Employer: Imperial Inc.
 Position: Sales professional
 Requirements: Entry-level position. Telephone sales, involves cold calling to establish sales territory. Sedentary work level.
 Wage: \$27,000 per year

- (4) Employer: APAC Customer Services, Inc.
 Position: Customer service representative
 Requirements: Entry-level position, 6 months work experience, computer experience helpful but not required, the ability to type 20 wpm is preferred but flexible
 Wage: \$7.50-\$9.00 per hour

- (5) Employer: Alternative Entertainment
 Position: Customer Service Representative
 Requirements: Good telephone communication skills, the ability to interact with a wide variety of people, basic computer skills desired, sedentary work level.
 Wage: \$9.00 per hour

CX 3:72-73; EX 6:2-3.

The record reflects that on October 4, 2002, Dr. Merritt signed off on the above positions as being within Mr. Tappa's "permanent restrictions." CX 3:73.

A November 5, 2003 letter drafted by Ms. Holmes indicates that she had ceased performing a labor market survey representative of occupations available to Mr. Tappa. She noted that Mr. Tappa "has limited access to many job prospects he otherwise would have been considered for based upon the fact that he is prohibited from the operation of a motor vehicle and

has been charged with his 5th + operating while intoxicated citation, a felony charge.” Ms. Holmes further noted that public transportation is sparse in the Marinette/Menomonee area, which eliminates Mr. Tappa’s access to several position openings. In addition, because of his situation, Mr. Tappa was restricted from positions that he otherwise would have been considered for, such as gate guard, parking attendant, and courier driver. EX 6:1.

Ms. Holmes testified that her labor market survey (EX 6:2-3) identified five potential employers in the greater Marinette area for Mr. Tappa. Tr. at 86, 88. From a vocational standpoint, she considered Green Bay, Oconto, Peshtigo, and Marinette all to be within the same labor market. Tr. at 87. On cross examination, she admitted that Marinette is a “tough labor market,” that there is high unemployment, and that there is “not a lot of industrial base.” Tr. at 96. She indicated that Dr. Merritt had approved her labor market survey at the time she submitted it to him, meaning that he had “signed off on all the positions” as being “within Mr. Tappa’s physical capabilities.” Tr. at 87-88; EX 7:3-4. Based upon her review of the labor market survey, her assessment of Mr. Tappa, and the response she received from Dr. Merritt, she determined, within a reasonable degree of professional medical certainty, that Mr. Tappa was employable within his transferable skills and at the entry level in October 2002. Tr. at 88. On cross examination, Ms. Holmes admitted that she had never seen the U.S. Department of Labor form signed by Dr. Merritt and dated July 31, 2002 (CX 3:810). Tr. at 99-100. This form indicated that Mr. Tappa’s “sitting capacity is 30 minutes with breaks and then up to five hours.” Tr. at 101.

Ms. Holmes testified that at the time she performed the labor market survey, she was aware of Mr. Tappa’s prior felony convictions and took them into account in conducting her survey. Tr. at 88-89. Ms. Holmes noted that his prior conviction status would hinder him from certain types of employment, such as security work or work in hospitals. However, she had not been aware that Mr. Tappa’s driver license had been suspended or revoked, and testified that this would certainly have an effect on his ability to obtain employment. She explained that the Marinette area has poor public transportation, which would preclude Mr. Tappa from getting to and from work. In addition, he would be precluded from jobs that require driving or a driver’s license as part of the position. Tr. at 89. On cross examination, Ms. Holmes testified that she did not have any information on whether Mr. Tappa would be able to get an occupational license. She did not have any information as to what kind of sentence Mr. Tappa could expect for OWI. She also did not know whether there were work release privileges available. Tr. at 115.

While the positions she had identified were entry level, and Mr. Tappa would have otherwise been considered for them, his lack of a license would affect his ability to perform some of the jobs. For example, his ability to perform the job of taking customers to model homes would be impacted, since his lack of a license would preclude him from being able to transport the customers to the properties. Tr. at 90.

Ms. Holmes next provided testimony regarding some of the other positions she cited in her labor market survey. Insofar as the position that Mr. Tappa had characterized as requiring computer experience, Ms. Holmes specified that the position “desired” but “did not require” computer skills, and that the employer was willing to train. Tr. at 90. Thus, Mr. Tappa would not be excluded from that position based on his lack of computer skills. She testified that, based

on her investigation of the wiring harness job in Oconto, the position would accommodate for Mr. Tappa's condition as she understood it from the FCE. She noted that the position was "mainly sitting" and that he would "be able to alternate between sitting and standing assembling wire harnesses within a ten-pound weight range." Tr. at 91. Ms. Holmes stated sales "telephone sales is very entry level for sales occupations." Accordingly, she did not seem to think that Mr. Tappa would be precluded from this position based on his lack of sales experience. Tr. at 91-92. On cross examination, Ms. Holmes admitted that she was unable to find any available positions in customer service in Marinette, Menominee, or Peshtigo. Tr. at 97. She also noted that the abilities she would look for in a successful salesperson in the customer service field: pleasant personality, ability to interact with others. Tr. at 111-112. To that end, Ms. Holmes indicated that she had had no trouble interacting with Mr. Tappa and did not find him "abhorrent." Tr. at 117.

Ms. Holmes testified that there were two other customer service jobs she identified in her labor market survey: "Imperial" and "APEC." She stated that Imperial is a cable television company. APEC, located in Green Bay, provides customer service representatives to companies. Tr. at 112. She testified that Mr. Tappa would be suitable for this type of entry-level employment, and that these were sedentary positions in which he would be working by telephone. Tr. at 112-113.

Ms. Holmes testified that, while Mr. Tappa had testified that he did not believe he had the physical capacity to drive to the locations of these various jobs or to perform at these various jobs, she would rely more on Dr. Merritt's indications, who signed off on those jobs. Tr. at 93. She believed it would be "worth a shot" for Mr. Tappa to try the entry-level jobs she had identified in the labor market survey. Tr. at 117.

After she performed the labor market survey and obtained the approval of Dr. Merritt, Ms. Holmes did not have any further contact with Mr. Tappa. She faxed the labor market survey to Mr. Tappa's attorney, Mr. Kulkoski. She had no further contact with Mr. Kulkoski as she was asked to close her file. Tr. at 93. Neither Mr. Tappa nor Mr. Kulkoski ever contacted her to seek assistance in obtaining the positions identified in the labor market survey. Tr. at 93-94. She testified that had they contacted her, she would have provided the assistance. Such additional services would not be unusual in her line of work. She was skilled in performing those extra steps and had done so before in other cases. Tr. at 94.

Ms. Holmes testified that she did not have anything to do with determining a loss of earning capacity for Mr. Tappa, i.e. determining some residual earning capacity to calculate a rate that the insurance carrier would pay reduced benefits to Mr. Tappa. Tr. at 113. Ms. Holmes stated that Mr. Tappa used to earn \$13.98 per hour as a welder. She stated that she had not been asked to take the jobs she identified and calculate how much the average weekly wage would be and see what percentage of his welder salary that would be. Tr. at 114.

Linda Schmidt Goss, a vocational expert and consultant, testified on behalf of Mr. Tappa at the hearing. Ms. Schmidt Goss holds a Master's Degree in counseling for students in pre-school through twelfth grade vocational as well as students in non-traditional higher education. She is a nationally certified counselor by the Board of Certified Counselors. She is also a

licensed professional counselor certified by the state of Wisconsin. In addition, she is a private vendor for worker's compensation and is hired by private consumers referred to her by the Department of Vocational Rehabilitation. Ms. Schmidt Goss is also a certified career counselor and a member of the National and State Vocational Rehabilitation Association. Tr. at 121. She testified that approximately 75 percent of her practice involves worker's compensation and approximately 20 percent of her practice involves divorces. Tr. at 121-122. The remainder of her practice is devoted to working with the Department of Vocational Rehabilitation and other clients that are referred to her for assistance. Tr. at 122. She has provided expert testimony in the past. Tr. at 121.

Ms. Schmidt Goss testified that she had been retained for this case in November 2002 and that she had met with Mr. Tappa on two occasions. Tr. at 123. She also testified that, while she did not submit a report in connection with his file,² she did review certain material in Mr. Tappa's file to form opinions regarding his case. Tr. at 122. Her understanding of Mr. Tappa's physical restrictions was that he is able to work four to five hours per day, and that he is able to sit for 30 minutes, and then he "needs to accommodate his pain in whatever way he needs to, however that's interpreted." Tr. at 123. She testified that in terms of lifting, Mr. Tappa is in the sedentary category, meaning that he could lift 10 pounds or less. Tr. at 123-124.

At hearing, Ms. Schmidt Goss provided her impressions of Mr. Tappa's discomfort level and "pain presentation" when she met with him. She testified that when she interviewed him, "he got up, I don't even know if it was 30 minutes from sitting." She further stated that when he was sitting, he was "leaning on the left or leaning to the right." She also stated: "I do know that when he was walking, if he did choose to walk, he had a limp on the left side. He did not walk for 30 minutes. He would lean up against something." She did not see him lift anything other than putting on his coat. Finally, she stated: "Whatever Mr. Tappa did, he did very gingerly." Tr. at 124-125.

Ms. Schmidt Goss compared Mr. Tappa's welding skills to those of other welders with whom she had worked and concluded that he was "right up there almost in a journeyman's status." Ms. Schmidt Goss characterized welding as heavy labor and further noted that Mr. Tappa's description of his work "seemed to be in the heavy labor area." Tr. at 125. In terms of transferable skills, Ms. Schmidt Goss reiterated that Mr. Tappa was educated in welding, and that "the type of welding Mr. Tappa used to perform would be transferable to areas such as jewelry welds, which are very intricate, very small." Tr. at 126.

² Initially, the Claimant called Ms. Schmidt Goss as part of his case in chief. The Employer/Carrier objected on the grounds that the Claimant had provided no reports or records of her work in response to the pre-hearing order, and that she was a rebuttal witness. Counsel for the Claimant said he had not asked her to prepare a report. Tr. at 75. I ruled that the pre-hearing order did not require a report, and that she should be allowed to testify as a rebuttal witness. Tr. at 75-78, 119-120. On cross examination, she testified that she could not recall whether the Claimant's attorney, had directed her not to prepare a report. However, she further stated that she does not always prepare reports in connection with these cases and that it is not uncommon for her to provide testimony without a report. Tr. at 134-135.

Ms. Schmidt Goss also provided testimony on her labor market research in the northeast Wisconsin area. She stated that “[i]n Marinette ... the male clientele, [Mr. Tappa is] in the most competitive bracket according to the Department of Workforce Development profile for the country,” since “the male population there for workforce has declined while the female is growing at a very rapid rate.” She further noted: “He is contained within the highest bracket, also the highest number of people looking for work. So, it’s very competitive.” Tr. at 126.

Ms. Schmidt Goss testified that she worked with Mr. Tappa on a resume and sat and talked with him extensively. Tr. at 126-127, 132. They talked about interviewing skills. She also noted that Mr. Tappa did go to the Department of Vocational Rehabilitation; however, they were unable to help him. Tr. at 132. Ms. Schmidt Goss testified that she looked into all kinds of positions for Mr. Tappa and found that a “good fit” for him was a position at “NEW Curative Rehabilitation” (“NEW”). She explained that NEW is an employer-paid, non-profit rehabilitation center where employees receive rehabilitation. She further stated: “They have work [hardening], they have therapy, they have life skills, they treat life skills, they have classes. They also actually employ people there and it’s all employer-paid.” She specified that it was a “non-competitive wage” and that there were perhaps 1 or 2, but very few, competitive wage jobs. She also indicated that it was a sheltered, industry safe facility in that it was a warehouse. Tr. at 127.

Ms. Schmidt Goss testified that she had also considered the five positions identified by Ms. Holmes. Tr. at 127. She indicated that the position at Unlimited Service, Inc., the wire harness company, was “closer to what [Mr. Tappa] has been doing in the past” and therefore saw it as “being a better fit.” Tr. at 128. She indicated that this was a sit-stand position and that “restriction-wise,” the sitting and standing is “something that would be consistent with Mr. Tappa’s urgency if he needed to stand up during the 30 minutes or so of working that he had to stretch to get the kinks out of his back or whatever.” Tr. at 144-145. She also agreed that this was not a “people job” and that it involved working independently. She also admitted that in this situation, he would be working in a factory, which would be somewhat consistent with his prior work activities where he worked in warehouses or factories. She admitted, therefore, that there would be “very little transitioning” job-wise. Tr. at 145. She also testified, however, that it is difficult to place disabled persons in such jobs. Tr. at 128, 146-147.

Regarding the position selling mobile homes, her primary concern was that he would have to show the homes and bend to look underneath, although other parts of the job would fit within his capabilities. Tr. at 128-129, 149-150. However, another problem she envisioned was that Mr. Voss indicated that he “wanted somebody who is eager, energetic, this is what they wanted to do, money was their motivator,” and she did not see these attributes as being Mr. Tappa’s attributes. Tr. at 129. She further testified that the job required someone who was motivated by money and she would not necessarily put Mr. Tappa in that category. Tr. at 150. She agreed with Ms. Holmes’ assertion that sales people need to be able to interact with the public and be pleasant. Tr. at 150-151. She testified that Mr. Tappa did not have those transferable skills for a sales position. Tr. at 151.

Regarding the “APEC and Alternate Entertainment” position, Ms. Schmidt Goss’ understanding was that this was a “temporary service” that was “short on hiring right now

because of the economy.” She stated: “It even got to the point that they don’t, they screen people before they actually go in and fill out an application.” Ms. Schmidt Goss testified that she had spoke to “Sandra” on the phone last November, who had advised that applicants “needed basic computer knowledge.” Ms. Schmidt Goss further pointed out that “the application is actually on the computer so that’s how they can tell whether [the applicants] have computer skills.” She further stated that “the computers are user friendly” and that “they need to type ... 20 words per minute.” Tr. at 129-130. She further testified that there was a 6-month waiting period and that a “consistent work history” was required. In addition, there was a “written assessment, spelling, math, and other assessments. So, it’s quite in-depth.” Tr. at 130. She also testified that she called Alternate Entertainment twice and left messages saying that she was interested in employment information about the company but they did not call back. Tr. at 131-132.

Regarding Mr. Tappa’s suitability for that type of employment, she testified that her concern was with the assessments. Tr. at 130-131. Specifically, Mr. Tappa had told her that he had not used math since high school. Tr. at 152. She stated that, while she believed he had a consistent work history,” she did not think that Mr. Tappa would “make it six months talking on the phone, sitting and standing and being able to, you know, do customer service.” She further stated: “Customer service is being nice to the customer, and if you’re not feeling well, if you’re in pain, if you have to go stand, if you need to go lie down, it really is not any, you know, thing to tell to them. It’s a very stressful job as well.” Tr. at 130-131. However, on cross examination, she admitted that there was no restriction on stress for Mr. Tappa. Tr. at 151. She also admitted that the position had been advertised as entry level. Tr. at 152. With regard to Ms. Holmes’ assertion that the six months of prior experience and computer experience would be helpful but not required, she stated: “When I talked to Sandra, she told me that these were the requirements for the job. So, maybe on a different day there was another person that Sara talked to. Tr. at 153.

Ms. Schmidt Goss also provided testimony on the Imperial job, which Ms. Holmes had identified as a cable TV solicitor. She testified that this was a full-time, entry level position in telephone sales that required “cold calling on people.” She pointed out that the job required estimation skills and excellent communication and negotiation skills. Ms. Schmidt Goss did not think this would a good fit for Mr. Tappa. Tr. at 131. On cross examination, she admitted that a telephone sales job is a sedentary position. Tr. at 164. She also admitted that cold calling to establish cable TV sales was easier than selling other products. Tr. at 161-163.

Suitable Alternative Employment

In order to show that there is suitable alternative employment, the Employer/Carrier must establish “that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform ... taking into consideration his age, background, education training, etc. ...” *Bunge Corp. v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000). Testimony by both Ms. Holmes and Ms. Schmidt Goss support the conclusion that it would be difficult for Mr. Tappa to find work in the local labor market. Ms. Holmes identified five positions which she believed fit within Mr. Tappa’s physical restrictions assigned by Dr. Merritt. Of those five, one involved wire harness electrical assembly, while the other four were in sales and customer service. I credit Ms. Schmidt Goss’ testimony that it is unlikely that Mr. Tappa

would be successful in securing and performing sales and customer service positions, given his education, background, employment, medical and social histories, and physical symptoms. I also credit her testimony that the absence of any computer skills would adversely affect Mr. Tappa's ability to obtain the customer service positions, and that the home sales position exceeded his physical limitations due to the requirement of showing the homes. The position with NEW identified by Ms. Schmidt Goss constitutes sheltered employment, and therefore is not suitable alternative work. See *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Thus, of all the positions identified by either vocational witness, only the electrical assembly job in Oconto, Wisconsin, was a realistic possibility. A single job opening, however, is generally not sufficient to satisfy the Employer/Carrier's burden of showing suitable alternative employment. See, e.g., *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *Vronthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154, 156-157 (1990). Given the competitive job market in Mr. Tappa's area, the facts in this case do not make it likely that he would be hired for the assembly job, for which he has no particular qualifications to set him above other applicants, see *P&M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991). Moreover, neither Ms. Holmes nor Ms. Schmidt Goss addressed the effect of Mr. Tappa's limitation to less than full-time work on his ability to find work. I therefore find that the Employer/Carrier has failed to establish the existence of suitable alternative employment, and conclude that Mr. Tappa is permanently totally disabled.

Section 8(f) Relief

Section 44 of the LHWCA, 33 U.S.C. § 844, creates a Special Fund for holding funds and disbursing payments related to the Act. Under certain conditions, Section 8(f) of the Act, 33 U.S.C. § 908(f), provides a limit on the liability of an employer for compensation when an employee who has an existing permanent partial disability suffers a new injury resulting in permanent partial or total disability. After reaching the limit set by Section 8(f) for payments by the employer, the Special Fund pays the compensation payments due the employee. In order to obtain relief for payment of compensation from the Special Fund pursuant to Section 8(f), an employer must show that there was a pre-existing permanent partial disability which was manifest to the employer, and which rendered it more serious than it otherwise would have been, i.e., that the disability was not due solely to the new injury. 33 U.S.C. § 908(f); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305-1306 (2nd Cir. 1992). In cases of permanent partial disability, the Employer/Carrier must also show that the disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. § 908(f)(1).

Marinette Marine filed both an initial and an amended application for Section 8(f) relief. It did not state in either application whether it sought 8(f) relief for permanent partial, or permanent total disability. It has always maintained, however, that Mr. Tappa is only partially disabled, and that his disability after the October 2001 injury was materially and substantially greater than that which would have resulted from the new injury alone. The District Director denied the application based on his determination that the Employer/Carrier had failed to meet the standard for 8(f) relief for a partial disability. See DX A. As I have found that Mr. Tappa is permanently totally disabled, the Employer/Carrier is not required to show that the disability from the new injury is materially and substantially greater than would have resulted from the

new injury alone. Moreover, the Director does not contest that Mr. Tappa had previous injuries to his back which were manifest to the Employer/Carrier based on his medical records. In order to establish that it is entitled to 8(f) relief, therefore, the Employer/Carrier must show with medical or other evidence that the October 2001 injury by itself would not have led to total disability. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 1186 (9th Cir. 1989).

Several doctors who treated Mr. Tappa or reviewed his records for the Employer/Carrier were asked to address the role his prior injuries played in his condition after the October 2001 injury. Dr. Goradia reviewed medical records in December 2001, before Mr. Tappa's surgery, and said he could not say for certain whether the lifting incident accelerated a pre-existing condition or caused additional damage. Although Dr. Weinshel's response to an inquiry from counsel for the Employer/Carrier was unsigned, it appears that he checked "Yes" to a question whether Mr. Tappa's pre-existing condition materially contributed to his present impairment and disability; however, Dr. Weinshel also checked on another form that it was "probable" that the October 2001 accident directly caused his disability. Dr. Merritt, on the other hand, checked that it was "probable" that the October 2001 accident caused his disability by precipitation, aggravation and acceleration of a pre-existing condition beyond normal progression. Finally, Dr. Sellers, also in an unsigned response, apparently agreed with the statement that Mr. Tappa's pre-existing disability and last employment-related injury resulted in a greater disability than he would have incurred from the last injury alone. None of these opinions are explained in the record. In any event, none of these statements meet the standard for Section 8(f) relief in a case of permanent total disability, that the October 2001 injury by itself would not have led to total disability. Because the Employer/Carrier has not carried its burden of proof on this issue, it is not entitled to 8(f) relief.

Interest

The Claimant is entitled to interest on any accrued unpaid compensation benefits. *Canty v. S.E.L. Maduro*, 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Renfro v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 47, 50 (1989). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982).

Attorney's Fees

Fees for claimants' representatives are addressed in the Act and the regulations at 33 U.S.C. § 928 and 20 CFR §§ 702.132 – 135. The Act prohibits the charging of a fee in the absence of an approved application. The Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all

parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections.

Conclusion

In summary, I conclude that Mr. Tappa is permanently totally disabled as a result of the October 15, 2001, injury to his back. He is entitled to compensation for permanent total disability commencing at the time of maximum medical improvement, which Dr. Merritt certified had occurred by July 31, 2002. The Employer/Carrier is not entitled to relief from compensation payments pursuant to Section 8(f), because it has failed to show that the October 2001 injury would not have resulted in total disability by itself.

ORDER

The claim for benefits for permanent total disability filed by William Tappa is GRANTED. I therefore ORDER:

1. The Employer/Carrier shall pay permanent total disability compensation to the Claimant beginning July 31, 2002, based on an average weekly wage of \$431.59, in accordance with Section 8(a) of the Act, 33 U.S.C. § 908(a). The Employer/Carrier shall receive a credit for amounts paid since July 31, 2002.
2. The Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.
3. The District Director shall make all calculations necessary to carry out this order.
4. The Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on the Claimant and opposing counsel, who shall have ten (10) days to file any objections.

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Alice M. Craft
Administrative Law Judge